86 1849

Supreme Court, U.S.
FILED
MAY 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1986

FRANCES LOLA WOMACK, Individually, and as Surviving Spouse of WILLIAM SIDNEY WOMACK, Deceased, JAMES A. CHANDLER, and IVA CHANDLER,

Petitioners,

v.

DONALD J. GETTELFINGER and DORIS Y. GETTELFINGER, d/b/a GETTELFINGER FARMS, and CHARLES S. RITTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

William D. Vines, III
Butler, Vines, Babb & Threadgill
810 First American Ctr.
P. O. Box 2649
Knoxville, TN 37901
(615) 637-3531

Counsel of Record

James C. Wright
Butler, Vines, Babb &
Threadgill
810 First American Ctr.
P. O. Box 2649
Knoxville, TN 37901
(615) 637-3531

Counsel for
Petitioners

QUESTIONS PRESENTED

1. Does the Constitution of the United States and this Court's holding in Erie R. R. v. Tompkins, infra, and its progeny compel the Federal Courts in jury trials to apply state standards in determining whether to grant motions for directed verdict or in the entering of judgments not-withstanding the verdict in diversity cases?

2. Does the new federal standard created by Sixth Circuit Judge Nelson for the determining of whether a directed verdict or judgment not withstanding the verdict is proper, violate the provisions of the Seventh Amendment of the United States Constitution?

3. Has Judge Nelson for the Sixth Circuit Court of Appeals failed to apply state law of punitive damages in review of the diversity action below?

LIST OF PARTIES

The plaintiffs in the original proceedings below were petitioners, Frances Lola Womack, individually and as surviving spouse of William Sidney Womack, James A. Chandler, for his own injuries, and Iva Chandler, his wife. The respondents before this Court were the original defendants herein, Donald J. and Doris Gettelfinger, d/b/a Gettelfinger Farms and Charles S. Ritter, the driver of the truck owned by Gettelfinger.

There were separate issues involved in the court below concerning the construction of a

settlement agreement and concerning the issue of contribution among tort feasors. Those issues involved Joe R. Woods and Linda Woods and Ronald D. Kennedy and Hattie Sue Kennedy. Since the aforesaid issues are not addressed in this petition, those persons are not named as parties herein.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

LIST OF PARTIES..... iii

TABLE OF AUTHORITIES..... vi

OPINIONS BELOW..... 1-2

JURISDICTION..... 2

CONSTITUTIONAL PROVISION..... 2

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT

I. The Constitution of the United States and this Court's holding in Erie R.R. Co. v. Tompkins, infra, and its progeny compels the Federal Courts in jury trials to apply state standards in determining whether to grant motions for directed verdict or in the entering of judgments notwithstanding the verdict in diversity cases..... 10

II. Even if the Federal Courts are to apply a federal standard in determining whether to grant motions for directed verdict and in entering judgments notwithstanding the verdict, the new federal standard created by Sixth Circuit Judge Nelson is in violation of the Seventh Amendment of the United States Constitution.....19

III. Judge Nelson for the Sixth Circuit Court of Appeals has failed to apply state law of punitive damages in review of the diversity action below.....25

CONCLUSION.....33

APPENDIX

Opinion of the Sixth Circuit Court of Appeals....APPENDIX A

Order of the Sixth Circuit Court of Appeals Denying Rehearing.....APPENDIX B

Memorandum and Order of the Federal District Court for the Eastern District of Tennessee Denying Judgment Notwithstanding the Verdict.....APPENDIX C

TABLE OF AUTHORITIES

CASES	Page
Adams v. Ford Motor Credit Co., 556 F.2d 737 (5th Cir. 1977)	23
Basham v. Pennsylvania R.R. Co., 372 U.S. 699, 83 S.Ct. 965, 10 L.Ed.2d 80 (1963)	23
Bernhardt v. Polygraphic Company of America, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1937)	26
Bryson v. Bramlett, 204 Tenn. 347, 321 S.W.2d 555 (1959)	31
Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 78 S.Ct. 893 2 L.Ed.2d 953 (1958)	27
Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959)	10
Dunn v. Sears, Roebuck & Co., 639 F.2d 1171 (5th Cir. 1981)	20
Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)	10, 11, 17, 18, 25

Gallick v. Baltimore & Ohio Railraod Co., 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963)..... 22

Garner v. Maxwell, 360 S.W.2d 64 (Tenn. App. 1961)..... 32

Guaranty Trust Company v. New York, 326 U.S. 99, 89 L.Ed. 2079, 65 S.Ct. 1464..... 26

Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)..... 26

Hersch v. United States, 719 F.2d 873 (6th Cir. 1983)... 21

Holmes v. Wilson, 551 S.W.2d 682 (Tenn. 1977) 14, 15, 16

Honaker v. Leonard, 325 F. Supp. 212 (E.D. Tenn. 1971)..... 28

Inland Container Corp. v. March, 529 S.W.2d 43 (Tenn. 1975) 28, 31

Inter-City Trucking Co. v. Daniel, 181 Tenn. 126, 178 S.W.2d 756 (1944)...29, 32

Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557 (1899)..... 27

Lavendar v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946)..... 23

Lucus v. American Manufacturing Co., 630 F.2d 291 (5th Cir. 1980)..... 20

Mortensen v. United States, 332 U.S. 369, 645 S.Ct. 1037, 88 L.Ed. 1331 1944..... 22

Potter v. Tucker, 668 S.W.2d 833 (Tenn. App. 1985)..... 15

Powell v. J. T. Posey Co., 766 F.2d 131 (3rd Cir. 1985)..... 21

Sakamoto v. N.A.B. Trucking Co., Inc., 717 F.2d 1000 (6th Cir. 1983) 29, 32, 33

Sentilles v. Carribean Shipping Corp., 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142 (1959)..... 22

Smith v. Tri-County Electrical Membership Corp., 689 S.W.2d 181 (Tenn. App. 1985)..... 28

Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 355 S.W.2d 436 (1962)..... 32

Stepp v. Black, 14 Tenn. App. 153 (1931)..... 28

Toth v. Yoder Co., 749 F.2d 1190 (6th Cir. 1984) 8, 16

Williams v. Union Carbide Corp., 790 F.2d 552 (6th Cir. 1986)..... 30

Womack v. Gettelfinger, 808 F.2d 446 (6th Cir. 1986) 8, 9, 30, 32

CONSTITUTION
United States Constitution, Amendment Seven..... 19

MISCELLANEOUS
5A J. Moore and J. Lucas, Moore's Federal Practice, ¶50.06 (1986)..... 11

160 A.L.R. 1231..... 26

24 Tenn. Juris., Verdicts, §24..... 16

27 Tenn. L.Rev. 381-382 (1960)..... 29

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1986

FRANCES LOLA WOMACK, Individually, and as Surviving Spouse of WILLIAM SIDNEY WOMACK, Deceased, JAMES A. CHANDLER, and IVA CHANDLER,

Petitioners,

v.

DONALD J. GETTELFINGER and DORIS Y. GETTELFINGER, d/b/a GETTELFINGER FARMS, and CHARLES S. RITTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Frances Lola Womack, individually and as surviving spouse of William Sidney Womack, James A. Chandler, and Iva Chandler respectfully pray that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on December 29, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 808 F.2d 446, and is also reprinted in the appendix hereto, Appendix A.

The order of the Sixth Circuit Court of Appeals denying the rehearing and denying rehearing en banc is reprinted in the appendix hereto, Appendix B.

The memorandum opinion and order of the United States District Court for the Eastern District of Tennessee denying respondent's motion for judgment notwithstanding the verdict is reprinted in the appendix hereto, Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The panel for the Federal Court of Appeals for the Sixth Circuit entered its judgment below on December 29, 1986. Rehearing and Rehearing En Banc denied, February 19, 1987.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment Seven:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact

> tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This case arose when a tractor trailer operated by respondent, Charles S. Ritter, and owned by respondent Gettelfinger Farms intentionally blocked a two lane highway in the dark and heavy fog. Respondent Ritter did so knowing that it created a hazard, that an accident might result, and without taking steps to warn oncoming traffic of the danger. Shortly, a serious accident occurred when a car in which petitioner Frances Lola Womack's decendant, William Sidney Womack, and petitioner John

A. Chandler were passengers collided with the trailer. In addition to the proof of intentional conduct as to the blocking of the highway without safety precautions, the proof showed the defendant company intentionally violated federal standards as to the hiring, training, and testing of the driver. This driver, hired only by a secretary, had never driven a truck alone and failed the only driver's test he had ever attempted at another company. He was not tested here. In fact, the dispatcher said, "if you can get it out of the drive, you're hired". The only person familiar with the

driver's qualification stated he was incompetent. The proof showed the accident was caused by the incompetentcy. Further, the company intentionally set a policy of violating federally mandated time limits for driving.

Petitioners brought the original action for compensatory and punitive damages in the United States District Court for the Eastern District of Tennessee. Jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332.

At the close of an eight day jury trial, the trial judge denied respondent's motion for directed verdict on the issue of punitive damages and submitted the matters

of both compensatory and punitive damages to the jury.

The jury returned a verdict of $610,963.02 compensatory damages and punitive damages totalling $1,250,000.00. Subsequently, the trial judge overruled respondent's motion for judgment not withstanding the verdict on the issue of punitive damages.

In deciding whether or not to grant each of respondent's motions concerning the issue of punitive damages, the trial judge did not expressly articulate whether he followed state or federal standards and restrictions in his evaluation of the sufficiency of the evidence presented at trial on the matter of punitive damages.

Nonetheless, the trial judge in actuality was consistent with the established Tennessee standards in weighing the sufficiency of the evidence to make his determination, finding that "...there was substantial evidence in the record from which the jury could have concluded that punitive damages were warranted" Appendix C, P. 5-6, and further specifically found that "...the plaintiffs produced a great deal of evidence regarding why their position of punitive damages was appropriate and should be sustained." Appendix C, Page 16. Furthermore, this application of the state law standard was required by the federal district judges of the Sixth Circuit. Toth v. Yoder

Co. 749 F.2d 1190 (6th Cir. 1986).

However, Judge Nelson writing for the Sixth Circuit set a new federal standard for federal trial judges in their dispositions of motions for directed verdict and judgments not withstanding the verdict. In deciding that the trial judge below erred in not granting these motions, Judge Nelson reweighed the evidence, found that it was a "close issue," and simply stated that "[o]n the facts of the case, we do not believe the Tennessee Supreme Court would sustain an award of punitive damages against Mr. Ritter." Womack v. Gettelfinger, 808 F.2d 446, 454 (6th Cir. 1986), Appendix A, P. 14. Yet, Judge Nelson did

not in form or in substance adhere to Tennessee's standard for a trial judge's disposition of these motions or Tennessee's standard for appellate review of a trial judge's discretion in not granting these motions.

The Sixth Circuit panel upheld the award of petitioners' compensatory damages but reversed the jury's award of punitive damages by its own standard. Womack v. Gettelfinger, 808 F.2d at 456, Appendix A, pp. 18-19.

It is from this reversal of the jury's award of punitive damages that Petitioners respectfully seek review.

REASONS FOR GRANTING THE WRIT

I. —

The Constitution of the United States and this Court's holding in Erie R.R. Co. v. Tompkins, infra, and its progeny compels the Federal Courts in jury trials to apply state standards in determining whether to grant motions for directed verdict or in the entering of judgments notwithstanding the verdict in diversity cases.

While recognizing that the Courts of Appeals were not in agreement, this Court in Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959) expressly left open the decision as to which standard should be applied when jurisdiction rested on diversity of citizenship. Dick v. New York Life Ins. Co., 359

U.S. at 444-45, 79 S.Ct. at 926, 3 L.Ed.2d at 941.

Therefore, this Court has not determined whether, in a diversity case, when ruling on a motion for a directed verdict or in ruling on a motion for judgment notwithstanding the verdict, a federal court may apply a federal test for the sufficiency of the evidence presented at trial or whether the principles established by this Court in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1938), require the federal courts to apply the standards of state law. See, generally, 5A J. Moore and J. Lucas, Moore's Federal Practice, ¶50.06 (1986).

Yet Judge Nelson, in writing for the Sixth Circuit Court of Appeals, established a new federal standard to be applied in diversity jury trial cases for a federal trial judge's determination of the sufficiency of the evidence in deciding whether to grant a directed verdict and in deciding whether to grant a judgment not withstanding the verdict. Essentially, Judge Nelson now mandates that federal trial judges, under penalty of reversal, re-weigh the evidence themselves, assess the credibility of the witnesses, and utilize a preponderance of the evidence test in determining what shall constitute sufficient evidence for not granting a motion

for directed verdict nor the entering of a judgment notwithstanding the verdict.

After reweighing the evidence de novo without any presumptions or inferences in favor of the nonmoving parties (petitioners), Judge Nelson found the respondent's direct examination of its witnesses to be the most credible. Judge Nelson then relied on this testimony, found the case to be a "close one," and reversed the Tennessee trial judge's finding that there was "great evidence" to support the submission of punitive damages to the jury. This approach is wholly contrary to the Tennessee state law standard.

In Tennessee, the standards to be applied by a trial court judge in determining whether to grant a directed verdict or in deciding whether to enter a judgment notwithstanding the verdict are the same. Holmes v. Wilson, 551 S.W.2d 682 (Tenn. 1977). That standard, or test, requires that trial judge to

> ...take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be drawn from the whole evidence. A verdict should not be directed during, or after, trial except where a reasonable mind could draw but one conclusion.

Holmes v. Wilson, 551 S.W.2d at 685. The Tennessee Courts of Appeals are persistent in holding trial court judges to this standard. In Potter v. Tucker, 688 S.W.2d 833 (Tenn. 1985), the Court of Appeals further noted that a motion for directed verdict must be denied where there is "...any dispute as to any material determinative evidence..." Potter v. Tucker, 688 S.W.2d at 835 (emphasis added).

Additionally, in Tennessee the Courts of Appeals are held to the same standards as the trial courts in reviewing the lower court's discretion in ruling on motions for directed verdict and judgments not withstanding the verdict. Holmes

v. Wilson, 551 S.W.2d at 685. 24 Tenn. Juris., Verdicts, §24. Furthermore, "[n]either the trial judge nor the reviewing court is privileged to weigh the preponderance of the evidence when passing upon a motion for a directed verdict or for a judgment n.o.v." Holmes v. Wilson, 551 S.W.2d at 685. Also, the trial court nor appellate court on review is to determine the credibility of the witnesses at trial.

The standards and restrictions to be applied by the Federal Courts of the Sixth Circuit in diversity cases, until the opinion written by Judge Nelson, was thought to be those of the states. Toth v. Yoder Co., 749 F.2d 1190 (1984). Yet

Judge Nelson's new federal standard is materially different from that which constrains the Tennessee Courts. Because of the clear outcome-determinative effect that the choice in standard presents, denial of petitioner's right to the judicial application of the state law standards, as a matter of substantive law, is thus a violation of this Court's holding in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1938), and its progeny. Judge Nelson spends pages of judicial ink, painstakingly weighing the evidence, concluding the whole accident could be explained by a mere "momentary lapse in judgment" by the truck driver and that

Gettelfinger Farms did not deserve punitive damages for its entrustment of the tractor trailer to Mr. Ritter. In so finding, Judge Nelson did not consider that under the state's standard as applied by the trial judge in Tennessee the accident could just as easily be explained (and supported by the evidence) to be a result of not only the gross negligence of the respondent Gettelfinger Farms and its driver respondent Ritter, but also a result of intentional violation of federal safety regulations and state law.

Consequently under Erie, the state court standard is required and would support a reversal of the Court of Appeals and a

reinstatement of the trial court judgment of punitive damages.

II.

> Even if the Federal Courts are to apply a federal standard in determining whether to grant motions for directed verdict and in entering judgments notwithstanding the verdict, the new federal standard created by Sixth Circuit Judge Nelson is in violation of the Seventh Amendment of the United States Constitution.

The evidence and testimony at trial and the version contained in Judge Nelson's opinion after he had reweighed the evidence bespeak of two different fact scenarios.

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty

> dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common Law.

In short, "[t]he Seventh Amendment forbids appellate judges to sit as post-trial assessors and denies them the power to vacate awards because they might, as fact-triers, have decided differently" Dunn v. Sears, Roebuck & Co., 639 F.2d 1171, 1175 (5th Cir. 1981). See Lucus v. American Manufacturing Co., 630 F.2d 291, 293 (5th Cir. 1980) (in light of the Seventh Amendment an appellate court should proceed cautiously when asked to set aside a jury verdict).

In those circuits where a federal standard is applied to diversity cases, the standard is clear. That is, both the trial judge and the appellate courts are to apply the same standard in making a decision on a motion for directed verdict as for j.n.o.v. Powell v. J.T. Posey Co., 766 F.2d 131 (3rd Cir. 1985), Hersch v. United States, 719 F.2d 873 (6th Cir. 1983). As a guideline for the Appellate Courts, it is well settled that evidence may not be re-weighed and the jury verdict may not be set aside merely because the appellate judges could have drawn different inferences or conclusions from the evidence or feel that other results are more reasonable

or preferable. Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108, 83 S.Ct. 659, 9 L. Ed 2d 618 (1963); Sentilles v. Carribean Shipping Corp., 361 U.S. 107, 80 S.Ct. 173, 4 L. Ed 2d 142 (1959).

Applying a federal standard of review, the most an appellate court can do is to determine whether there was any competent and substantial evidence in the record which fairly tends to support the verdict. Mortensen v. United States, 332 U.S. 369, 645 S.Ct. 1037, 88 L. Ed. 1331 (1944). Furthermore, an appellate court will not overturn a jury's verdict even though contradictory evidence was presented, if there is an evidentiary basis for the verdict.

Basham v. Pennsylvania R.R. Co., 372 U.S. 699, 83 S.Ct. 965, 10 L. Ed.2d 80 (1963); Lavender v. Kurn, 327 U. S. 645, 66 S.Ct. 740, 90 L. Ed. 916 (1946).

The right to jury trial on the issue of punitive damages and the right of a plaintiff to have the issue of damages, whether compensatory or punitive, decided by a jury, devolves from the Seventh Amendment. It is only in the case where the amount awarded by a jury appears to be so excessive as to be unconscionable and to arise from bias, passion, or prejudice that appellate courts may consider it appropriate to intervene. Adams v. Ford Motor Credit Co., 556 F.2d 737 (5th Cir. 1977).

Instead of focusing upon the facts clearly meriting submission to the jury of the issue of punitive damages under Tennessee law, Judge Nelson, in writing for the Sixth Circuit Panel, re-weighed the evidence and then discounted or ignored the plaintiff's (petitioner's) proof as to the intentional acts of the respondents. This "new" finding of fact is in complete contradiction to the proof at trial and such actions by the Sixth Circuit violate the tenets of the Seventh Amendment.

III.

Judge Nelson for the Sixth Circuit Court of Appeals has failed to apply state law of punitive damages in review of the diversity action below.

The decision as rendered by Judge Nelson has caused judicial destruction of claims for punitive damages under state law in diversity cases. Repugnant to even the most centralist viewpoint of federalism, Judge Nelson has seen fit to apply his own standard for punitive damages awards rather than the state law standard (in this case, Tennessee's) mandated by this Court's holding in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed 1188 (1938), and its progeny.

> The federal court enforces the state

> created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts. Yet, in spite of that difference in procedure, the federal court enforcing a state created right in a diversity case is, as we said in Guaranty Trust Company v. New York, 326 U.S. 99, 108, 65 S.Ct. 1464, 89 L.Ed 2079, 2086, 160 A.L.R. 1231, in substance 'Only another court of the state.' The federal court therefore may not 'substantially affect the enforcement of the right as given by the State.' Id. 326 U.S. 109.

Bernhardt v. Polygraphic Company of America, 350 U.S. 198, 100 L.Ed 199, 76 S.Ct. 273 (1937); see also Hanna v. Plumer, 380 U.S. 460, 14 L.Ed 2d 8, 85 S.Ct. 1136 (1965);

Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 2 L.Ed 2d 953, 78 S.Ct. 893 (1958).

To be sure, punitive damages, in view of recent trends in the so called "liability crisis" are a sensitive area in the law. Many commentators have sought to stem the flow of punitive damages that plaintiffs would otherwise receive, but not Tennessee courts. To obtain punitive damages in Tennessee, the plaintiff need only satisfy a low threshold requirement. Thus, punitive damages

> ...are awarded in cases involving fraud, malice, gross negligence or oppression, Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557

> (1899); or where a wrongful act is done with a bad motive or so recklessly as to imply a disregard of social obligations, Stepp v. Black, 14 Tenn. App. 153 (1931); or where there is such willful misconduct or entire want of care as to raise a presumption of conscious indifference to consequences. Honaker v. Leonard, 325 F.Supp. 212 (E.D. Tenn. 1971).

Inland Container Corp. v. March, 529 S.W.2d 43, 45 (Tenn. 1975) (emphasis added); Smith v. Tri-County Electrical Membership Corp., 689 S.W.2d 181, 185 (Tenn. App. 1985).

It should be noted that this broad standard for an award of punitive damages is written in the disjunctive. That is in Tennessee an award of punitive damages is proper, as an example, upon a

finding of mere conscious indifference to the consequences of one's actions. InterCity Trucking Company v. Daniel, 181 Tenn. 126, 178 S.W.2d 756 (1944); Sakamoto v. N.A.B. Trucking Co., Inc., 717 F.2d 1000 (6th Cir. 1983) (applying Tennessee law of punitive damages). 27 Tenn. L.Rev. 381-382 (1960).

Thus, Tennessee has a low threshold, but it is the unmistaken public policy of the State of Tennessee. Furthermore, it is wholly unpalatable for the Sixth Circuit to compromise these notions of Tennessee justice. Yet this is what has happened.

The Sixth Circuit, has erroneously decided that there ought to be a mens rea requirement to

support an award of punitive damages in Tennessee. Judge Nelson, makes this conclusion, based on an earlier decision by the Sixth Circuit using Arkansas law. Womack v. Gettelfinger, 808 F.2d at 452, Appendix A, p. 10. In that case, the Court stated "the most recent construction of Arkansas law . . . ruled that punitive damages were only available when 'the defendant acted wantonly or with such a conscious indifference to the consequences that malice might be inferred'. . . It is well established in Arkansas that negligence, even gross negligence, does not suffice for an award of punitive damages." Williams v. Union Carbide Corp., 790 F2d 552,

556-557 (6th Cir. 1986). Tennessee, however, clearly allows an award of punitive damages for conduct that amounts to gross negligence. Inland Container Corp. v. March, 529 S.W.2d 43 (Tenn. 1975); Bryson v. Bramlett, 204 Tenn. 347, 321 S.W.2d 555 (1959).

In attempting to reach his desired result, Judge Nelson even tries to distinguish types of gross negligence wherein an act may be sufficiently grossly negligent to bar a claim for contributory negligence but not grossly negligent enough to support punitive damages. This distinction is not supported in any Tennessee decision, but is used by Judge Nelson in an attempt to explain

away Tennessee case law. See Womack v. Gettelfinger, 808 F.2d at 452-453, Appendix A, pp 10-14, citing, Intra-City Trucking Co. v. Daniels, 181 Tenn. 126, 178 S.W.2d 756 (1944); Garner v. Maxwell, 360 S.W.2d 64 (Tenn. App. 1961); Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 355 S.W.2d 436 (1962). Also, Judge Nelson fails to acknowledge the close parallel, factually and legally, between the present case and Sakamoto v. N.A.B. Trucking Co., Inc., 717 F.2d 1000 (6th Cir. 1983) (applying Tennessee law). In Sakamoto, the appellate court stated that it must be constrained to respect the Tennessee trial judge's ruling in the state law issue concerning

punitive damages. Sakamoto, 717 F.2d at 1003.

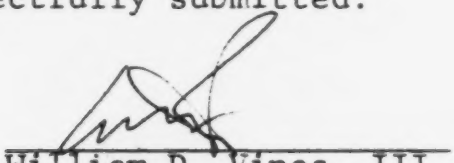
In conclusion, Judge Nelson, in writing for the Sixth Circuit overlooked the experienced trial judge's application of Tennessee law and has now mandated that a defendant must possess intense culpability and a bad motive in order to justify an award of punitive damages in Tennessee, even though the clear Tennessee law on the issue makes no such requirement. Furthermore, Judge Nelson cites no Tennessee law to indicate an express or implied trend to make the threshold of punitive damages awards higher.

CONCLUSION

Petitioners would welcome the opportunity to submit to this Court

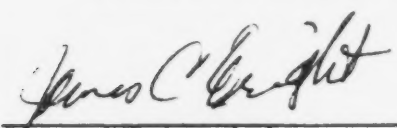
further briefs on any of the issues above. We respectfully conclude that the writ of certiorari be granted.

Respectfully submitted.



William D. Vines, III
Butler, Vines, Babb &
Threadgill
810 First American Ctr.
Knoxville, TN 37901
(615) 637-3531

Counsel of Record



James C. Wright
Butler, Vines, Babb &
Threadgill
810 First American Ctr.
P. O. Box 2649
Knoxville, TN 37901
(615) 637-3531

Counsel for
Petitioners

May 18, 1987

APPENDIX A

District Court #83-650
83-649

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-5613, 84-5614, & 84-5651

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FRANCES LOLA WOMACK,
Plaintiff-Appellee (84-5613),

and

JAMES A. CHANDLER, et al.,
Plaintiffs-Appellees (84-5614),

v.

DONALD J. GETTELFINGER, et al.,
Defendants/Third-Party Plaintiffs-Appellants,

v.

RONALD D. KENNEDY, et al.,
Third-Party Defendants-Appellees (84-5651).

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed December 29, 1986

Before: JONES and NELSON, Circuit Judges; and PECK, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge. At 6:30 in the morning of October 14, 1983, defendant Charles S. Ritter, a rela-

tively inexperienced truck driver operating a tractor-trailer owned by defendant Gettelfinger Farms, entered a two lane state highway from the driveway of a restaurant in rural Tennessee. The highway ran north-south, and Mr. Ritter approached it from the west side. Keeping the rear wheels of his trailer in sight in his rear view mirror, and taking care that they did not go into a ditch that was present at the side of the driveway, Mr. Ritter made a wide right turn, swinging onto the shoulder at the far side of the road. He intended to pull into the southbound lane at the completion of his turn.

Third-party defendant Ronald D. Kennedy, driving his automobile north on the highway, saw the headlights of the truck pointing toward him from the shoulder. It was still dark, and there was a very heavy fog. Confused by the position of the oncoming truck headlights, and failing to see the trailer angled across the road, Mr. Kennedy drove into the side of the trailer. One of his passengers, William Sidney Womack, was killed, and another passenger, plaintiff James A. Chandler, was injured.

Mr. and Mrs. Chandler and Mr. Womack's widow brought federal court diversity actions against Mr. Ritter and Gettelfinger Farms, seeking compensatory and punitive damages. The defendants filed third-party complaints against Mr. Kennedy and against Joe R. and Linda Woods, the operator and owner, respectively, of an automobile that hit the Kennedy car some minutes after the initial accident.

The two original actions were tried to a jury, and after defense motions for a directed verdict as to punitive damages had been denied, Mrs. Womack and Mr. and Mrs. Chandler recovered judgments against Mr. Ritter and Gettelfinger Farms for compensatory damages totaling $610,963.02 and punitive damages totaling $1,250,000. The magistrate before whom the case was tried then entered summary judgment against Gettelfinger Farms and the truck driver on their third-party claims for contribution or indemnity and for damage to the tractor-trailer. The magistrate held that these claims

were barred by the jury's finding that the defendants had been guilty of conduct warranting the award of punitive damages. While the case was on appeal, Mr. and Mrs. Woods entered into a $2,500 settlement with Mrs. Womack and obtained a release of liability from her. On the strength of this release, the Woods have moved for dismissal of the appeal of the summary judgment as to them on mootness grounds, the third-party complaint in the Chandler case having been dismissed by agreement prior to trial.

The central issue presented on appeal is whether the magistrate erred in submitting the claim for punitive damages to the jury and in overruling a motion for judgment notwithstanding the verdict on the punitive damage issue. The question is a close one, but we have concluded that the Tennessee courts probably would not permit an award of punitive damages under the circumstances of this case. We shall therefore reverse both the judgment for the plaintiffs, insofar as it awards punitive damages, and the summary judgment for the third-party defendants.

I

The rig that Mr. Ritter was driving consisted of a 1979 Mack cab-over tractor, with manual transmission and five forward gears, and a refrigerated trailer 42 feet in length. Gettelfinger Farms, a trucking concern, turned the rig over to Mr. Ritter on September 29, 1983, when he started work for Gettelfinger Farms as a probationary employee. Mr. Ritter had driven the tractor-trailer for several thousand miles by the time of his accident, picking up and discharging loads of perishable food products at various points in Mississippi, Texas, Michigan, Tennessee, Ohio and Kentucky.

On the evening before the accident Mr. Ritter was driving east on Interstate Route 40 in Tennessee, hauling a full load of food products that he was supposed to deliver in New Jersey the following afternoon. He testified that he pulled off the road at about 9 p.m., having encountered thick fog, and

BEST AVAIL

spent the night sleeping in his cab. As is customary, the diesel engine of his truck and the diesel-powered refrigerator unit on his trailer were left running. Mr. Ritter got up a few minutes before 6 a.m., made a safety check, and noted that the fuel gauge on the refrigeration unit's diesel fuel tank registered only one-eighth full. Although it was still foggy, Mr. Ritter resumed his journey, keeping an eye out for a place to refuel. Having noticed a billboard advertisement for a truck stop that he assumed would be at the next exit, as he testified, Mr. Ritter took that exit and drove north for a short distance on Tennessee State Route 95.

Seeing a lighted restaurant at the right hand side of the road, Mr. Ritter parked his truck on the shoulder of the road, still pointing north, and went into the restaurant to ask where he could buy fuel. He was told that he would have to turn around and go back in the direction from which he had come.

Mr. Ritter testified that he then went back to his truck, turned off his "four-way flashers" (both turn signals on the tractor and on the trailer), signaled for a left turn, and pulled onto the road. Because he was going very slowly, looking for a place to turn around, he testified that he put his flashers back on.

About two-tenths of a mile farther on Mr. Ritter saw another restaurant, this one on the left side of the road. The restaurant had a paved driveway and parking area. Mr. Ritter made a left turn into that driveway, looped around in the parking lot, and stopped his truck before reentering the highway. He testified that he looked both ways, saw nothing coming, and pulled out onto the road to begin his turn to the right. He was operating in low gear at half throttle.

Looking down to his right, Mr. Ritter saw a ditch at the side of the driveway. He wanted to make sure that his rear wheels did not slip into the ditch, which might have caused his loaded trailer to flip over on its side, so he made a wide turn, pulling onto the shoulder at the far side of the road.

BLE COPY

He kept the right rear wheels of his trailer in sight in his mirror, to make sure he was keeping the wheels away from the ditch. The fact that the tractor did not have power steering may have led him to make his turn even wider than it would have been otherwise.

As Mr. Ritter was maneuvering onto the road, Mr. Ronald Kennedy, an iron worker at a local construction project, was driving north in a Ford Escort automobile. Two fellow iron workers, Mr. Womack and Mr. Chandler, were passengers in the car; Mr. Chandler was in the front seat, and Mr. Womack was dozing in the back. Mr. Kennedy's car was equipped with halogen fog lights, and it was going about 35 miles an hour.

Rounding a slight curve to the south of the restaurant, Mr. Kennedy saw the headlights of the truck about 400 or 500 feet away. Surprised at the position of the headlights, Mr. Kennedy made a comment about them to Mr. Chandler. Mr. Chandler responded "It looks like he is on our side [of the road]" and then said "No, he is over to our right." Mr. Kennedy agreed, saying "Yeah, he is sitting on the shoulder of the road." Neither man saw the trailer angled across the road until it was too late to stop. Mr. Kennedy had taken his foot off the accelerator, slowing down to about 25 miles per hour, but did not see the trailer until he was past the headlights of the tractor. Mr. Kennedy swerved to the left just before the impact, but could not avoid hitting the trailer. The driver of the truck, Mr. Ritter, (concentrating, perhaps, on his rear wheels and the ditch) did not see the oncoming automobile in time to flash his lights, sound his horn, or otherwise signal Mr. Kennedy to stop. There was evidence from which the jury could reasonably have inferred that the truck's four-way flashers were not on. The truck was equipped with a reflectorized triangle, but Mr. Ritter had not set it out before starting his turn. There was testimony from a state official, Ronald Stanley, the triangle would have done no good in the fog. Flares would have been visible, but Gettelfinger Farms did

not equip its trucks with flares and was not required to do so by government regulations.

Mr. Stanley, the state official, happened on the scene just after the accident. Driving south on State Route 95 at a speed of 30 to 40 miles per hour, and seeing the back of the trailer sitting on the road, Mr. Stanley eased his patrol car around it. (He had no trouble stopping in time.) When he saw there had been a collision, Mr. Stanley parked on the shoulder of the southbound lane and turned on his flashing blue lights. Mr. Ritter, who had stopped his truck after the impact and jumped out of his cab, asked Mr. Stanley if he should move the truck out of the road. Mr. Stanley told him to do so. Mr. Ritter then backed up a foot or two, disengaging the trailer from the Kennedy car, and pulled the entire rig onto the shoulder of the northbound lane. He left his lights on, as Mr. Stanley told him to.

Some ten or fifteen minutes after the accident, Mr. Joe R. Woods, driving his car north on State Route 95 at around 30 or 35 miles per hour, saw the headlights of the truck on the shoulder to his right and the blue lights of the patrol car on the opposite shoulder. He did not see the Kennedy vehicle in the middle of the road until he had gone past the headlights of the truck. He slammed on his brakes when he saw the Kennedy car, but could not avoid hitting it. Mr. Womack was still in the car.

Mr. Ritter subsequently admitted that he had caused the accident because he had been blocking the road. Mr. Ritter said he "was going to jail," but in fact he was only fined $10 plus court costs for failure to yield the right-of-way.

An experienced truck driver who testified as an expert witness on behalf of the plaintiffs told the jury that although he did not believe Mr. Ritter should have been put in prison, it was very dangerous for him to have pulled out onto the far side of the road in the fog without using flares. There was some suggestion that it would have been possible to make

the turn without going much over the center line, in which event flashing lights would have provided all the warning necessary, but the main thrust of the testimony was that Mr. Ritter ought to have remained in the restaurant parking lot until the fog had lifted.

Extensive evidence was also presented on Mr. Ritter's lack of experience as a truck driver and on the failure of Gettelfinger Farms to investigate his qualifications before hiring him. Mr. Ritter, a married man in his early thirties, had a 9th grade education and had spent fifteen years working in service stations and at odd jobs. He had a long-time friend named Larry Goode, a truck driver by trade, who had allowed Mr. Ritter to ride with him, off and on, for several years, and who had worked with Mr. Ritter to teach him to drive a truck. Federal regulations require that anyone in the cab of a truck "be certified and capable of driving," according to Mr. Goode's testimony, and in 1981 Mr. Goode had signed a certificate of qualification attesting to Mr. Ritter's ability to drive. Mr. Goode subsequently gave Mr. Ritter a second certificate, with an expiration date subsequent to the date of the accident. Mr. Goode let Mr. Ritter drive a total of between 700 and 1000 miles over a period of about three months prior to the accident in 1983. Mr. Goode sometimes slept while Mr. Ritter was driving. Both men had log books, and when Mr. Goode drove more than the legal limit, the excess time would apparently be logged to Mr. Ritter. Mr. Ritter would take over the driving when the men approached weigh stations where log books might be checked.

In 1982 Mr. Goode got Mr. Ritter a job spotting trailers at a General Electric facility, but other drivers had to help Mr. Ritter do the work and he was soon released from the job.

In August of 1983 Mr. Ritter applied for a job at Victory Freightways and was given a road test, which he failed. The person who administered the test could not remember the reason Mr. Ritter did not pass the test, but Mr. Ritter testified

that it was because he missed a gear in shifting gears on a tractor that had a number of forward speeds.

Two months later both Mr. Goode and Mr. Ritter went to Gettelfinger Farms and filled out job applications. Mr. Gettelfinger testified that Mr. Goode told him Mr. Ritter, although short on experience, could safely handle a tractor-trailer, but Mr. Goode testified that no such conversation occurred, that he did not feel Mr. Ritter was qualified, and that he had lied when he certified Mr. Ritter as qualified. There is also a conflict in the evidence as to whether the men were given written open-book examinations before being hired.

Both men were called to work at the same time, and each man was given a truck to drive. No road tests were administered as far as they knew, but Mr. Gettelfinger testified that he followed Mr. Ritter in a pickup truck for 10 to 15 miles to check on Mr. Ritter's driving. Mr. Goode disputed this. It is clear, in any event, that Mr. Ritter drove the Gettelfinger truck for several thousand miles prior to the accident; that he and Mr. Goode "ran together" during the first week or ten days of their employment, staying no more than twenty miles apart from one another; and that Mr. Ritter had no mishap during that time. He did have a minor accident the day before the collision with which we are concerned here; it was occasioned, he testified, by someone cutting too sharply in front of him and then stopping at a red light.

Some weeks after the major accident Mr. Ritter had an accident in Texas. He told Gettelfinger and the state troopers that a deer had run in front of him, but Mr. Goode testified that Mr. Ritter said he had really fallen asleep at the wheel.

The punitive damage claims against Gettelfinger Farms were submitted to the jury under the theory of respondeat superior (as is permissible, under Tennessee law, where the agent's conduct would justify a punitive damage award against the agent) and under the theory that the accident had

been caused by gross negligence in the entrustment of the truck to an incompetent driver. The jury's verdict was a general one, making it impossible to tell which theory (or theories) the jury accepted in assessing punitive damages against Gettelfinger Farms as well as against the truck driver.

II

Summarizing Tennessee case law going back to the last century, the Tennessee Supreme Court has said that punitive damages

> "are awarded in cases involving fraud, malice, gross negligence or oppression, *Knoxville Traction Co. v. Lane,* 103 Tenn. 376, 53 S.W. 557 (1899); or where a wrongful act is done with a bad motive or so recklessly as to imply a disregard of social obligations, *Stepp v. Black,* 14 Tenn. App. 153 (1931); or where there is such willful misconduct or entire want of care as to raise a presumption of conscious indifference to consequences. *Honaker v. Leonard,* 325 F.Supp. 212 (E.D. Tenn. 1971)." *Inland Container Corp. v. March,* 529 S.W.2d 43, 45 (Tenn. 1975).

It is only in cases involving this kind of egregious misconduct that punitive damages may be awarded. *Johnson v. Husky Industries, Inc,* 536 F.2d 645, 650 (6th Cir. 1976); *Cathey v. Johns-Manville Sales Corp.,* 776 F.2d 1565, 1570 (6th Cir. 1985), *cert. denied* _ U.S. _, 92 L.Ed.2d 740 (1986). Intended to inflict punishment on the wrongdoer rather than to make the injured party whole (which is what compensatory damages are supposed to do, insofar as possible), punitive damages are based "upon the oppression of the party who does the injury." *Cathey,* 776 F.2d at 1570, citing *Lazenby v. Universal Underwriters Insurance Co.,* 214 Tenn. 639, 642, 383 S.W.2d 1, 4 (1964). Tennessee views punitive damages as "private fines," *Dykes v. Raymark Industries, Inc.,* 801 F.2d 810, 814 (6th Cir. 1986), citing *Huckeby v. Spangler,* 563 S.W.2d 555 (Tenn. 1978), and this quasi-criminal pun-

ishment is not to be imposed for mere negligence or want of care. To do so—particularly when the dollar amount of the "fine" is measured in the millions—could raise "important issues" under the United States Constitution. See *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. __, __, 89 L.Ed.2d 823, 837 (1986).

The standards for determining whether the wrongdoer's conduct is sufficiently oppressive to justify an award of punitive damages have been characterized as "confusing and devoid of any effective definition." Sales & Cole, "Punitive Damages: A Relic That Has Outlived Its Origins," 37 Vand.L.Rev. 1117, 1137 (1984). Unless the federal courts are prepared to hold punitive damages unconstitutional, however, or hold that they cannot be imposed without according the defendant some or all of the safeguards peculiar to criminal proceedings—neither of which courses is urged on us here —federal courts must apply the state-created standards as best they can, limiting any recovery to compensatory damages where liability is based on garden-variety negligence (see, *e.g., Williams v. Union Carbide Corp.*, 790 F.2d 552 (6th Cir. 1986), applying Arkansas law), and permitting the jury to consider awarding both punitive and compensatory damages where the defendant's misconduct manifests the kind of *mens rea* that makes it reasonable for the government not only to require payment of full compensation, but to exact retribution as well.

The two Tennessee decisions that come closest to suggesting Mr. Ritter could properly be found guilty of gross negligence or reckless misconduct in the case at bar are *Inter-City Trucking Co. v. Daniels*, 181 Tenn. 126, 178 S.W.2d 756 (1944) and *Garner v. Maxwell*, 360 S.W.2d 64 (Tenn. Ct. App. 1961). Both cases involved trucks that were left parked on the highway at night, without adequate warning devices, while the drivers took their ease elsewhere. In each instance the truck driver was guilty of more than a momentary lapse of judgment, and in neither case did punitive damages, as such, play a significant role in the decision.

Daniels was a wrongful death case in which the decedent's widow recovered judgment, after a $2500 remittitur, for $6000. There was no award of punitive damages; only because of the defendant trucking company's attempt to rely on a contributory negligence defense did the question of "gross negligence" on the part of the truck driver arise. Under Tennessee law, contributory negligence on the part of the plaintiff's decedent would have meant that the widow and her three minor children could have recovered nothing—not even the modest compensatory damages awarded in the trial court—unless the truck driver (who, incidently, had no driver's license) could be said to have been guilty of gross negligence. Perhaps it is not too surprising that the Tennessee Supreme Court was able to discern gross negligence. In the first place, the truck driver had been guilty of negligence per se in failing to comply with a Tennessee statute requiring three lighted flares or pot torches to be placed around a vehicle parked on the highway at night. The truck driver did claim to have set out the required pot flares, but instead of standing by to keep them burning, he went into town to seek comfort and protection from the cold and remained away for at least an hour and a half. The flares (if they had been placed at all) went out, and the plaintiff's decedent was killed as a result. Likening the truck driver's attitude to that of a person who is guilty of criminal negligence, the court allowed the $6000 compensatory damage award to stand.

In *Garner v. Maxwell*, 360 S.W.2d 64, *supra*, a truck driver had left his disabled tractor-trailer outfit parked on the highway, at night, for about four hours. The truck driver had turned off the lights of the truck to save the battery and had gone home to bed, leaving the rig unattended and without the statutorily required three flares or three reflectors. The truck driver made no effort to employ a wrecker to get the tractor-trailer off the highway. A member of the Tennessee Highway Patrol ran his automobile into the tractor-trailer at about 12:30 a.m. A jury returned a verdict awarding the patrolman $21,000 for compensatory damages and $400 for

PUBLISHER'S NOTE :

The following pages are unavailable for filming:

12 and 13

radioed to the tower operator that he was "having trouble" with the ADF and that he "didn't pick up the outer marker," a ground radio facility which would indicate his location. The plane then flew approximately 20 miles beyond the airport and crashed into the side of Holston Mountain, killing the plaintiff's decedent.

The Tennessee Supreme Court held there was sufficient evidence to support the jury's verdict that the defendant airline was "guilty of negligence in respect of the condition of its plane and the manner of its operation," *id.* at 662, 355 S.W.2d at 446, but also held that there was "no evidence that [the defendant] was guilty of such gross and wanton negligence as to justify any award for punitive damages." *Id.* at 664, 355 S.W.2d at 446-47. In setting aside an award of punitive damages in the relatively modest amount of $5,000, the court said that

> "While petitioner's (defendant's) pilot and First Officer were negligent in undertaking to fly a plane not airworthy, and in their manner of operation of the plane, there is nothing to show such gross and wanton negligence on their part as to evince conscious indifference to consequences. It must be remembered that their own lives were at stake, and they evidently expected to make a safe landing."

Id. at 665, 355 S.W.2d at 447.

So it was in the present case; in undertaking to pull out onto the highway in the fog, risking injury to himself and damage to the truck, Mr. Ritter evidently expected to make a safe turn. His negligence was not so gross or wanton as to evince conscious indifference to the consequences of his action. On the facts of this case, we do not believe the Tennessee Supreme Court would sustain an award of punitive damages against Mr. Ritter.

III

Insofar as the award of punitive damages against Gettelfinger Farms is concerned, our conclusion that Mr. Ritter was

not guilty of gross or wanton negligence means that his employer cannot be held liable for punitive damages on a respondeat superior theory. Conceptually, however, gross negligence in the entrustment of the tractor-trailer to a known incompetent could justify an award of punitive damages even without gross negligence on the part of the driver himself. See Tenn. Code Ann. § 20-9-502 (1980); *Tracy v. Finn Equipment Co.*, 290 F.2d 498 (6th Cir.), *cert. denied*, 368 U.S. 826 (1961). On the record of this case, we do not believe that the negligence of Gettelfinger Farms in entrusting its truck to Mr. Ritter can support an award of punitive damages.

Evidence presented at trial indicated that Mr. Ritter was not properly certified to drive the truck. The jury reasonably could have found that Mr. Ritter did not pass either the required road test or a written test prior to his employment by the Gettelfingers. Mr. Ritter did, however, present a competency certificate signed by Mr. Goode, an experienced driver, and the fact that Mr. Ritter drove the Gettelfinger truck for several thousand miles without significant incident shows that Mr. Ritter did, in fact, know how to drive. The accident in this case did not result from inability to shift gears or maneuver the truck; it resulted from a lapse of judgment that no pre-employment test would have been likely to predict. Negligent though Gettelfinger Farms may have been in hiring Mr. Ritter, the entrustment of a $200,000 tractor-trailer to an apparently responsible driver does not bespeak the kind of wanton misconduct necessary to support a punitive damage award.

IV

Rejecting two subsidiary claims advanced by the defendants, we do not find the compensatory damage awards excessive, nor do we believe that the district court abused its discretion in failing to grant the defendants a continuance. We shall therefore affirm the judgment of the district court insofar as it awards compensatory damages against Mr. Ritter and Gettelfinger Farms.

BEST AV

V

The magistrate granted the third-party defendants' motions for summary judgment in the third-party action against Mr. Kennedy and Mr. and Mrs. Woods because, under Tennessee law, "[t]here is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death." Tenn. Code Ann. § 29-11-102(c) (1980). Equating gross negligence with intentional infliction of injury or death, the magistrate held that this statutory provision precludes grossly negligent tortfeasors from obtaining contribution or indemnity. We need not address that issue, having determined that as a matter of law the third-party plaintiffs were not guilty of gross negligence. Simple negligence does not bar contribution or indemnity among joint tortfeasors.

As the magistrate has held, the third-party plaintiffs may not recover for damage to the truck. Although it is unclear whether federal or state collateral estoppel rules should be applied in determining the preclusive effect, in the third-party action, of the negligence finding in the trial of the wrongful death and personal injury actions, Tennessee and federal law would dictate the same result here. In cases governed by federal law, collateral estoppel may clearly be invoked in situations such as that presented here. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). Although the Tennessee Supreme Court has not precisely so ruled, it has indicated in dicta that it would follow the rationale of the Supreme Court (and the courts of other states) in holding that collateral estoppel may be used defensively by one who was not a party to the prior suit. See *Cotton v. Underwood*, 223 Tenn. 122, 131-32, 442 S.W.2d 632, 637 (1969); see also *Fourakre v. Perry*, 667 S.W.2d 483 (Tenn. App. 1983). Whether federal law or Tennessee law is applied, therefore, the third-party plaintiffs in this case are collaterally estopped from relitigating the issue of their own negligence. "Under Tennessee law contributory negligence is

AILABLE COPY

ordinarily a complete bar to a plaintiff's recovery." *McElroy v. Boise Cascade Corp.*, 632 S.W.2d 127, 136 (Tenn. App. 1982). Therefore, because the accident was found to have been caused by the third-party plaintiffs' negligence, Gettelfinger Farms is precluded from recovering from Mr. Kennedy for damage to its tractor-trailer.

VI

Finally, Mr. and Mrs. Woods have moved to dismiss the appeal as to them on the basis of their settlement agreement with Mrs. Womack. Tennessee Code Annotated § 29-11-105 (1980) provides.

> "(a) When a release or covenant not to sue or not to enforce judgment is given in good faith to one (1) of two (2) or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor."

In order for the Woods to be protected, under this statute, against a claim for contribution, the release must have been "given in good faith." The third-party plaintiffs contend that the release in this case was not given in good faith. As evidence of that fact, they point out that although Mrs. Womack was awarded $175,963.02 in compensatory damages and $500,000 in punitive damages, the settlement with the Woods was in the amount of only $2,500. Moreover, that

settlement was entered into after entry of judgment, when the damage amounts were already determined.

Whether a release was given in good faith is a question of fact to be determined first by the trier of fact. *Florow v. Louisville & Nashville Railroad Co.*, 502 F.Supp. 1 (M.D. Tenn. 1979). The magistrate will have an opportunity to consider this question on remand.

Because Tenn. Code Ann. § 29-11-105 does not govern indemnity, we must look elsewhere to determine whether the third-party plaintiffs may still assert a cause of action against the Woods for indemnity. In *Southern Railway Co. v. Foote Mineral Co.*, 384 F.2d 224, 226-27 (6th Cir. 1967), this court approved the following jury instruction:

> "Under the Tennessee law a person who is held liable for negligence to one party may be indemnified or may recover indemnity in the amount of his liability from a third-party, if he establishes that the third-party is also guilty of negligence proximately causing or contributing to the cause of the accident, and that the negligence of the third-party was active negligence while his own negligence was only passive."

The instruction went on to explain that if one joint tortfeasor was guilty of active negligence, he could not recover indemnity from the other tortfeasor. *Id.* at 226. If both were guilty of active negligence, however, one could recover *contribution* from the other. *Id.* at 226-27. (Contribution is not available, as noted above, where there has been a good faith release.)

Because the magistrate granted summary judgment in favor of the Woods on the basis that one found guilty of gross negligence is not entitled to indemnity or contribution, and thus did not consider the active/passive negligence issue, that issue, too, should be addressed by the magistrate on remand.

We AFFIRM the award of compensatory damages.

REVERSE the award of punitive damages, and REMAND the third-party action for further proceedings in accordance with this opinion.

APPENDIX B

No. 84-5613/5614/5651

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANCES LOLA WOMACK, INDIVIDUALLY AND AS SURVIVING SPOUSE OF WILLIAM SIDNEY WOMACK, DECEASED,

Plaintiff-Appellee,

v. (FILED 2/19/87)

DONALD J. GETTELFINGER d/b/a GETTELFINGER FARMS AND CHARLES S. RITTER,

Defendants-Appellants

BEFORE: JONES and NELSON, Circuit Jduges, and PECK, Senior Circuit Judge

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to

the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

[Signed: John Hehman]
John P. Hehman, Clerk

No. CIV-3-83-649
No. CIV-3-83-650

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
TENNESSEE NORTHERN DIVISION

JAMES A. CHANDLER and wife, IVA I. CHANDLER, and HATTIE SUE KENNEDY,

Plaintiffs, (FILED 6/22/84)

v.

DORIS Y. GETTELFINGER and DONALD J. GETTELFINGER, d/b/a GETTELFINGER FARMS, and CHARLES RITTER,

Defendants and Third-Party Plaintiffs,

v.

RONALD D. KENNEDY,

Third-Party Defendant,

and

RONALD D. KENNEDY,

Third-Party Plaintiff by Counterclaim,

v.

DORIS Y. GETTELFINGER and DONALD J. GETTELFINGER, d/b/a

GETTELFINGER FARMS, and CHARLES RITTER,

Third-Party Defendants by Counterclaim

and

FRANCES LOLA WOMACK and HATTIE SUE KENNEDY,

Plaintiffs,

v.

DORIS Y. GETTELFINGER and DONALD J. GETTELFINGER, d/b/a GETTELFINGER FARMS, and CHARLES RITTER,

Defendants and Third-Party Plaintiffs,

v.

RONALD D. KENNEDY, JOE R. WOODS and LINDA WOODS,

Third-Party Defendants,

and

RONALD D. KENNEDY,

Third-Party Plaintiff by Counterclaim

v.

DORIS Y. GETTELFINGER and DONALD J. GETTELFINGER, d/b/a GETTELFINGER FARMS and CHARLES RITTER,

Third-Party Defendants by
Counterclaim

MEMORANDUM OF ORAL FINDINGS
AND CONCLUSIONS FROM THE BENCH

Before the Court is the motion of the Defendants for judgment notwithstanding the verdict of the jury or, alternatively, for a new trial or for remittitur. The undersigned has now had an opportunity to hear the arguments of counsel, to study the record as a whole and to read the respective post-trial memoranda submitted by counsel. The Defendant has raised approximately 12 points in support of its motion. I will try to deal with each of these briefly.

The Defendants claim that the undersigned should not have

submitted the question of whether or not Mrs. Gettelfinger was a partner to the jury. A motion for directed verdict on the point was made at the conclusion of all the proof. It appears from the pretrial order and III, Section C and D thereof, that the following stipulations were made:

> "Defendants Doris and Donald Gettelfinger, d/b/a Gettelfinger Farms, are citizens and residents of the State of Indiana. At all times material, Charles Ritter was acting within the course and scope of his employment with Gettelfinger Farms."

It appears from this stipulation that the Defendants admitted or stipulated to a principal and agency relationship between Mr. and Mrs. Gettelfinger and the Defendant

Charles Ritter in the pretrial order. Of course, the record was amended later to reflect the fact that Mrs. Gettelfinger's correct name is Yvonne and not Doris.

Furthermore, the undersigned is of the opinion that there was sufficient evidence to state a claim for jury consideration regarding Mrs. Gettelfinger's status as a partner.

The Defendant claims that the amount of punitive damages in excessive and that the award of punitive damages must be set aside because the Plaintiff did not introduce any evidence of the Defendants' financial worth. The undersigned is of the opinion that there was substantial evidence in

the record from which the jury could have concluded that punitive damages were warranted.

Furthermore, introduction of the financial worth of Defendants is a matter that is optional with the parties. It is not required in order that an award of punitive damages be approved. Odom v. Gray, 508 Southwest 2d 526 (Tennessee 1974).

Next, the Defendants object that the case should have been continued or that the severance which was granted should not have been granted. The undersigned is of the opinion that this is a matter of discretion as set forth in Rules 14(A) and 42(B) of the Federal Rules of Civil Procedure.

In this case, the Third-Party actions primarily concern indemnity and contribution with certain counter-actions for personal injuries and damages. In the case of Kosters v. Seven-Up, 595 Fed.2d 347 (Sixth Circuit 1979), the Court held in a products liability case that the trial judge acted within its discretion in severing the third-party claims for indemnity and contribution. The trial court was concerned that there would be a complexity of issues and jury confusion if that severance had not been granted. In the present case, the pretrial order listed 24 issues of fact and 11 issues of law in the case before third-party actions were severed. After the actions

were servered and the original action was tried, this case lasted almost two weeks. The Defendants were ready for trial when this case went to trial and the jury was apprised of the fact that the Defendants had sued other parites, and I don't see how the Defendants were prejudiced before the jury in this case by the fact that all the claims were not tried together. This ground will be overruled.

Next, the Defendants object that insurance, the question of insurance, was placed before the jury. Rule 411 of the Federal Rules of Evidence provides that evidence that a person was or was not insured against liability is not admissible upon the issue of

whether he acted negligently or otherwise wrongfully except in certain limited exceptions.

In this case, I think there are two reasons why this contention of Defendants must be overruled. First, the interrogatory asked the Defendants to state the name of the insurance carrier and coverage limits. The response noted was, "This information to be provided by Mr. Yancey." If the jury was able to see the response to the interrogatory and the interrogatory itself, I believe that that rather innocuous answer did not affect the substantial rights of the parties and would not be a basis for granting a new trial. Furthermore, the Defendants did not object to

the admission of the exhibit, and if it had done so or had requested to examine the exhibit before it was passed to the jury, they could have protected their rights. This ground will be overruled.

Next, the Defendants object that evidence of other accidents was admitted. I have stated my reasons for allowing that evidence in in an on-the-record, in-chambers conference which was held just before trial. It may be also that the Defendants have waived any objection to such accidents being admitted by their failure to make a contemporaneous objection at trial. In any event, I believe that the evidence was competent and not inadmissible.

Next, the Defendants object that certain incompetent evidence was received regarding a statement allegedly made by a dispatcher in the Defendant's employ. At trial, witness Larry Goode was asked by counsel for the Plaintiffs about what if anything he had been told as to what a person had to know to be able to drive a Gettelfinger truck. Mr. Goode started to answer the question, but Mr. Yancey objected on the ground that he did not know who the dispatcher was. At that point, the witness named a person and then I asked whether or not that person was an employee of Gettelfinger. The witness said "Yes." At that point, I said, "All right. You may proceed. Tell us

what he said." At that point, the witness testified, "He made a comment, 'If you can get out of the drive, you're hired,' and laughed about it." There was no motion to strike the evidence in accordance with Rule 103(a) (1) of the Federal Rules of Evidence. Furthermore, if the foregoing conversation between counsel and the Court and the witness could be interpreted as a question being posed to the witness by the Court, Rule 614 of the Federal Rules of Evidence provides that the Court may indeed ask questions of a witness and that if the parties have any objections thereto, they should make those objections known. No such objection appears on the record.

It therefore appears that the Defendants have waived any objections that they had to any such testimony. There is, therefore, no need to deal with the question of whether or not the statement was admissible as an admission of the party of proponent under Rule 801 of the Federal Rules of Evidence. This ground will be overruled.

The Defendant also claims that compensatory damages were excessive. The undersigned is of the opinion that this contention is clearly without merit.

The Defendants next object that the wrong mortality table was used, but no objection at trial was made to the use of such mortality

tables. Furthermore, it appears to the undersigned that there was no error in admitting the evidence as presented.

The Defendants next object that the undersigned did not give their tender charge on loss of profits. I specifically ruled at trial that the Plaintiff could not adduce such evidence before the jury and did not permit it. In fact, I excluded the testimony of their proffered expert witness on the subject. The charge tendered by the Defendants was, therefore, superfluous, and this contention is without merit.

Finally, the Defendants object to the undersigned's charge with respect to negligent entrustment.

In the undersigned's opinion, that charge correctly states the law of the State of Tennessee with regard to negligent entrustment.

Parties' motion to exceed the page limit for post-trial briefs are both hereby granted. It is further ordered that the Defendant's motion for judgment notwithstanding the verdict of the jury or alternatively for a new trial or for a remittitur be, and the same hereby is, denied.

As the Defendants correctly point out in their post-trial brief, to determine whether a damages award is excessive, the trial court must look at whether the award is clearly within the maximum limit of the reasonable

range. If the award is greater than the maximum amount that reasonably could be found, the Court must order a new trial or remittitur.

In this case, the Plaintiffs produced a great deal of evidence regarding why their position of punitive damages was appropriate should be sustained. The jury chose to believe that evidence, obviously. I cannot say that the verdict rendered was outside of the maximum limit of a reasonable range under the facts and circumstances of this case. To do so, in my opinion, would be an imposition upon the jury system itself.

File:

[Robert P. Murrian]

Robert P. Murrian

United States Magistrate

NO. CIV 3-83-649
NO. CIV 3-83-650

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
TENNESSEE, NORTHERN DIVISION

JAMES A. CHANDLER and wife, IVA I. CHANDLER and HATTIE SUE KENNEDY,

Plaintiffs,

v. (FILED 6/22/84)

DORIS Y. GETTELFINGER and DONALD J. GETTELFINGER d/b/a GETTELFINGER FARMS, and CHARLES RITTER,

Defendants.

and

FRANCES LOLA WOMACK and HATTIE SUE KENNEDY,

Plaintiffs,

v.

DORIS Y. GETTELFINGER and DONALD J. GETTELFINGER d/b/a GETTELFINGER FARMS, and CHARLES RITTER,

Defendants.

ORDER

For the reasons stated in an oral opinion rendered from the bench on June 22, 1984, it is hereby ORDERED that defendants' motion for judgment notwithstanding the verdict of the jury or alternatively for a new trial or remittitur be DENIED.

It is further ORDERED that the parties' joint motions for an order allowing them to exceed the page limits for their post-trial briefs be GRANTED.

It is further ORDERED that defendants' motions for a stay pending resolution of the aforementioned motions be DENIED as MOOT.

ENTER:

[Signed: Robert P. Murrian)

Robert P. Murrian
UNITED STATES MAGISTRATE